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In the Supreme Court
of the United States

OCTOBER TERM, 1956
No. 204

WILLIAM BENZ, et al, Individually and as Representatives of All of the Members of the SAILORS' UNION OF THE PACIFIC,

M. D. MacRAE, et al, Individually and as Representatives of All of the Members of Local 90 of the NATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL,

JEFF MORRISON, et al, Individually and as Representatives of All of the Members of ATLANTIC AND GULF DISTRICT, SEAFARERS' INTERNATIONAL UNION, AFL,

Petitioners,

vs.

COMPANIA NAVIERA HIDALGO, S. A., a corporation,

Respondent.

BRIEF FOR RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

QUESTIONS PRESENTED

Respondent, a Panamanian corporation, sued Petitioners, the members of American unions, by class procedure in the District Court for the District of Oregon.

Respondent recovered a judgment, affirmed by the Court of Appeals for the Ninth Circuit, for the damages caused by petitioners' conduct in peacefully picketing the S. S. Riviera, a Liberian flag tramp vessel owned by respondent, while it was at Portland, Oregon.

Petitioners were not picketing for themselves; but as the uncertified representatives of former members of the Riviera's crew, who were all foreign nationals, chiefly German and British.

The sole purpose of the picketing was to force Respondent to rehire these former crew members aboard the S. S. Riviera at higher wage rates and on conditions other than those contained in the articles entered into by such former crew members and which would still be governing them had they not been properly discharged for refusing to obey the lawful commands of the vessel's master and engaging in a sitdown strike for the same purpose.

The questions presented are:

1. Whether the protection of the Labor Management Relations Act of 1947, 61 Stat. 136 et seq., 29 U.S.C.A. Section 141 et seq., extends to picketing by American Unions seeking re-employment for foreign seamen aboard the foreign-flag vessel of a foreign shipowner during its briefly-intended call at a United States port?

2. Whether, if that Act does extend to such a foreign dispute, any protection which it might otherwise afford the picketing of Petitioners is overridden by the policies of the General Maritime Law against strikes by a crew

under articles and against the forced rehiring of a once-mutinous crew?

3. Whether that Act affords Respondent any remedy against the picketing of Petitioners so far in conflict with the common law remedy of damages as to deprive the District Court of jurisdiction to award such damages in these cases?

STATEMENT OF THE CASE

Many of the factual references contained in Petitioners' Statement of the Case are not to facts found by the District Court but to misleading and incomplete testimony, rejected by the District Court in making its findings, and irrelevant to the questions presented. Thus, for example, they recite that spoiled meat was loaded (Pet. Br. p. 8); but fail to state that it was not used but thrown overboard (Tr. 460) and that the Court found that Respondent had fully complied with its obligations under the articles (Tr. 240, 327, 373). We do not pause to correct all of these errors, but take the liberty of setting forth, summarizing in part, the findings actually made and which govern here.

Respondent is a Panamanian corporation (Tr. 237, 324, 370) and the owner and operator of the Liberian vessel S. S. Riviera (Tr. 239, 325, 371). The named petitioners are officers and members of three unincorporated maritime labor unions and were sued individually and as appropriate representatives of classes composed of all members of their respective unions (Tr. 237-8, 324-5, 370-71). The District Court found:

"Between March, 1952, and August, 1952, the crew members of the steamship Riviera, principally German and British, and all citizens of countries other than the United States, signed a British form of articles whereby said crew members agreed to work for a period of two years and further agreed that British Maritime Board conditions were to apply to wages and hours of employment, and agreed that shore leave and cash advances were to be at the discretion of the master of said ship. By the terms of said Articles of Agreement, said crew members and plaintiff herein agreed upon the wages to be paid to the crew members and the provisions to be furnished to crew members, and the scale of wages and provisions as agreed upon were set forth in said agreement. The wage rates specified therein for each crew member were equal to or higher than those customarily then paid for similar employment in the British Merchant Marine. Said crew members further agreed by the terms of said articles to be obedient to the lawful commands of said master in everything relating to said ship and the stores and cargo thereof, whether on board, in boats, or on shore." (Tr. 239-40, 325-6, 371-2).

After a voyage to the Orient, the Riviera came to Portland for repairs and to load a cargo of wheat, docking at that port on September 3, 1952 (Tr. 240, 326, 372-3). The findings of the Court continue:

"Plaintiff complied with all of its obligations under the terms of the ship's articles and the contract governing the relations between the plaintiff and members of the crew of said vessel." (Tr. 240, 327 373).

"On or about the 9th day of September, 1952, a number of members of the crew of the Riviera refused to obey the lawful orders of the master of said vessel and went on strike for the sole purpose of cutting down the term of their services from two

years, the length of service agreed upon in their Articles, and to obtain a higher wage rate and other conditions more favorable to them than those agreed upon in said Articles." (Tr. 240-41, 327, 373).

"From the date of said strike up to and including September 26, 1952, the said striking crewmen of said vessel remained aboard the vessel, continued to occupy their quarters, refused to continue to work aboard said vessel and refused to leave the vessel. On or about September 18, 1952, plaintiff filed in this court a possessory libel, bearing Civil No. 6629. On September 25, 1952, said striking crewmen were ordered by order of this court in said possessory libel to leave said vessel and said crewmen, on September 26, 1952, left said vessel." (Tr. 241, 327, 373).

"From September 9, 1952, until September 26, 1952, said striking members of the crew picketed the vessel. Said striking crew members or others acting for them picketed said vessel from September 26 through October 13, 1952, when they withdrew their picket line. On or about September 15, 1952, said striking members of the crew of the SS Riviera designated the Sailors' Union of the Pacific as their collective bargaining representative. Immediately after the withdrawal of said picket line and on October 14, 1952, members of the Sailors' Union of the Pacific, a voluntary unincorporated labor organization, acting pursuant to a resolution duly adopted by said Union, commenced picketing said vessel and continued to picket it until restrained and enjoined from further picketing by this court on November 26, 1952. Thereafter, and on that day, the picket line was removed from the said vessel. On November 28, 1952, a picket line was established at the vessel by three men acting for Local 90 of the National Organization of Masters, Mates and Pilots, A. F. of L., a voluntary unincorporated labor organization. On December 8, 1952, by decree of this court, members of said

Local 90 of the National Organization of Masters, Mates and Pilots and all persons acting by, through, under or in concert with them, were enjoined from picketing or otherwise interfering with the use of said vessel. Thereafter, and on that day, said picket line was removed from the vessel. On December 10, 1952, a picket line was established at the vessel by defendants Morrison and Johnson, acting for the Atlantic and Gulf District, S.I.U., A. F. of L. On December 12, 1952, by decree of this Court, members of the said Atlantic and Gulf District, S.I.U., A. F. of L., and all those acting by, through, under or in concert with them, were enjoined from picketing or otherwise interfering with the use of said vessel. Said picketing would have been continued had it not been so enjoined. All of said picketing, at, around or near the SS Riviera was conducted in a peaceful manner and without any violence." (Tr. 374-5, 241-2 in part, 327-9 in part).

The picketing was intended to prevent the repairing and loading of the SS Riviera and, the Court found, the sole purpose of the picketing by the Sailors' Union of the Pacific,

> "was to compel the plaintiff to re-employ the said discharged, striking members of the crew of the said SS Riviera for a shorter period than that stated in the articles, and at wage rates and other conditions more favorable to them than those stated in said articles." (Tr. 242).

The Court found that the picketing of each of the other unions was for the same purpose

> "and to help the Saliors' Union of the Pacific in obtaining that objective after it had been restrained from picketing for that purpose." (Tr. 329, 375).

Employees of the firms hired to repair and load the vessel respected the various picket lines, and the ship

was unable to work while the picketing continued (Tr. 242, 329-30, 375-5). The picketing was the proximate cause of plaintiff's damage, which the Court assessed at the rate of $900.00 per day (Tr. 244, 331-2, 376-7).

Each of the unions had an economic interest in the wages, hours and conditions of employment aboard ships carrying grain from Portland; and the wages paid aboard the RIVIERA were lower than those paid on ships with which these unions had contracts (Tr. 243, 331, 378).

SUMMARY OF ARGUMENT

The dispute underlying these cases is entirely foreign in nature and there is no reason to presume Congress intended to cover employment aboard foreign ships in writing the Taft-Hartley Act. The purpose of the Act was to remove "obstructions to the free flow of commerce"; but commerce could only be impeded and a great strain placed on our relations with other maritime nations if their ships were subjected to the necessity of renegotiating wages, hours and working conditions according to our standards whenever they fell within the range of our sovereign power and an American union's picket line.

The National Labor Relations Board has itself determined that its jurisdiction does not extend to foreign ships. *Companie Maritime Samsoc Ltd.. Sailors Union of the Pacific*, Case No. 20, R.C. 809, May 1, 1950, C.C.H. Labor Reports, 1950-51, NLRB Decisions, Par. 1081. In the absence of any language to the contrary Congress must be presumed to intend to limit

labor legislation to the "territorial jurisdiction" of the United States, *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 69 S.Ct. 571, 93 L ed. 680.

Sailors' Union of the Pacific, AFL, and *Moore Dry Dock Co.*, 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1940) and *Norris Grain Co. v. Seafarers' International Union*, 232 Minn. 91, 46 NW (2d) 94, 26 L.R.R.M. 2597 (1950); cited by Petitioners are not in point. They hold only that the Board had jurisdiction of complaints by American employers seeking injunction of unfair labor practices allegedly committed against them.

Even on an American owned ship, flying the stars and stripes and manned by American seamen, The National Labor Management Relations Act would not have protected "concerted activities" such as the crew of the Riviera engaged in by refusing to obey the lawful commands of the master and going on a sitdown strike. The requirements of discipline aboard ship prohibit conduct which might be protected if engaged in by workers ashore, *Southern SS Co. v. N.L.R.B.* (1942) 316 U.S. 31, 62 S. Ct. 886, 86 L ed. 1246; *Rees v. United States*, (CCA 4, 1938), 95 F.(2d) 784. A shipowner not only has a right to discharge a mutinous crew, but a duty to do so, since it renders the vessel unseaworthy, *Peninsular & Occidental Steamship Co. v. N.L.R.B.*, (CCA 5, 1938), 98 F(2d) 411.

Even a non-maritime employer cannot be forced to rehire an employee discharged for incompetence, illegal conduct or other just cause, and those who aid and abet sitdown strikes lose the protection of the Act, *N.L.R.B.*

v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S. Ct. 490, 83 L ed. 627, 123 A.L.R. 599. The picketing was one continuous chain of activity, starting simultaneously with the sitdown strike. To hold part of it protected activity merely because carried out by Petitioners would be to grant them rights as agents which their principals, the crew, did not have themselves.

The Labor Management Relations Act provides Respondent no remedy against the picketing of Petitioners. It was not a prohibited secondary boycott but primary picketing. The only case cited by Petitioners that considered the question so holds, *Sailors' Union of the Pacific and Moore Dry Dock Co.*, 92 N.L.R.B. 547, 27 L.R.R.M. 1108.

Even if it were a secondary boycot, the Act would provide no remedy. Section 303 speaks only of "any labor organization" and provides an action for damages only against them, not against individuals. In such cases a common law remedy for damages may be applied, *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 74 S. Ct. 833, 98 L ed. 1025.

Even as regards labor organizations against which the Act provides a remedy, the forum is not exclusive, but includes the forum here employed. No administrative determination by the Board is necessary before bringing an action for damages, *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 72 S. Ct. 235, 96 L ed. 275.

ARGUMENT

I. The National Labor Management Relations Act of 1947 Affords No Protection to Picketing of a Foreign Flag Vessel on Behalf of Foreign Seamen Seeking Foreign Employment From The Vessel's Foreign Owner

Petitioners' Brief argues that the mere fact that Respondent is a foreigner does not exempt it from the National Labor Management Relations Act (Pet. Br. 30-36). Possibly so; but Respondent is not the only thing foreign.

The dispute underlying these cases is entirely foreign in nature. It arose in the breach by foreign seamen of shipping articles, entered into at foreign ports, for service aboard the foreign flag vessel of a foreign shipowner. At the time of the picketing for which damages were awarded in these cases, it involved the subsequent efforts of these foreign seamen to force their foreign former employer to rehire them for further service aboard the foreign flag vessel, after they had been discharged for engaging in the sit-down strike which constituted the breach of their articles.

Because of this the District Court held the National Labor Management Relations Act of 1947 inapplicable. In his opinion, District Judge Solomon stated,

> "It seems clear to me that the Taft-Hartley Act is concerned solely with the labor relations of American workers—between American concerns and their employees in the United States, and it is not intended to, nor does it cover a dispute between a foreign ship and its foreign crew." (Pet. for Cert., p. 38).

Noting the foreign aspect of these cases, the Court of Appeals stated in its opinion,

> "It may well be that American laws should not be construed to apply, without some more explicit Congressional indication than we are able to find in the National Labor Relations Act, as amended, to situations with as many points of foreign contact as the situation at bar." (*Benz v. Compania Naviera Hidalgo*, 233 F.(2d) 62, at p. 65).

It found it unnecessary to rule on that point, however, as it affirmed the judgments on other grounds.

The National Labor Relations Board has itself determined that its jurisdiction does not extend to foreign ships. In *Companie Maritime Samsoc Ltd., Sailors Union of the Pacific*, Case No. 20, R.C. 809, May 1, 1950, C.C.H. Labor Reports, 1950-51, NLRB Decisions, Par. 1081, the Board dismissed a petition brought by the Sailors' Union of the Pacific to determine a collective bargaining agent for the crew of the Panamanian owned and registered vessel, the S. S. Pho Pho, "* * * on the ground that the internal economy of a vessel of a foreign registry and ownership was involved."

It is true that the definitions in the Act (61 Stat. 137, 29 U.S.C.A. § 152) are literally broad enough to encompass a foreign situation such as this. However, this Court has long held that words in acts of Congress having universal scope, "will be taken, as a matter of course, to mean only everyone subject to such legislation, not all the legislator subsequently may be able to catch." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357, 29 S. Ct. 511, 53 L. ed. 826, 832 (1909)

(Sherman Act held inapplicable to acts done in Costa Rica.) It has recently ruled that in the absence of any language to the contrary Congress must be presumed to intend to limit labor legislation to the "territorial jurisdiction" of the United States, *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 69 S. Ct. 571, 93 L ed. 680 (1949). (Eight-Hour law inapplicable to bases in Iraq and Iran.) And in the field of Admiralty, the court has even more recently held that the universal "any seaman" of the Jones Act was not intended to extend to a foreign seaman injured aboard a foreign ship in foreign waters, although jurisdiction of the parties was temporarily present in the United States, *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921, 97 L ed. 1254 (1953).

There is no reason to presume Congress intended to cover employment aboard foreign ships in writing the Taft-Hartley Act. The purpose of that Act was to remove "obstructions to the free flow of commerce" (61 Stat. 136; 29 U.S.C.A. § 151); but commerce could only be impeded if ships must pause at every briefly intended port of call to bring their labor conditions into accord with local law. The essence of the Taft-Hartley Act lies in its protection of collective bargaining and machinery for determining collective bargaining agents. Yet even the delays incident to selection of collective bargaining agents in our ports would impose a great burden on foreign shipping.

Moreover the articles of foreign ships are made in the light of the economy and customs of their own lands. To one nation a large crew all employed at a

modest wage may seem more desirable than a small crew employed at high wages. In any event the wage scale will be in accord with other employment in the native land rather than the highest or lowest of the economies at whose ports it calls. A nation whose shipping is much greater than necessary for its own commerce may deem articles for long voyages best, while a nation whose bottoms carry little but its own exports and imports may favor articles written for a short voyage from one home port to another. Among some nationalities an ample supply of alcoholic beverage for the crew or living quarters for the wives and families of ship's officers may be the sine qua non of good working conditions. Other nations may prohibit them, either by law or custom.

Innumerable other variances could be cited without adding to the obvious point that shipping would be disrupted and a great strain placed on our relations with other maritime nations of the world if their ships were subjected to the necessity of renegotiating wages, hours and working conditions according to our standards whenever they fell within the range of our sovereign power and an American union's picket line.

Petitioners argue, however, that the Act applies because they are members of American unions and their picketing was conducted on shore in the United States. Counsel for Petitioners repeat in their brief the allegations they made below that their picketing was for the purposes of securing recognition as a collective bargaining agent, protecting their own interests in working

conditions aboard vessels engaged in carrying some cargoes similar to cargoes carried by vessels on which their members were employed and securing employment for their members (Pet. Br. 25-26). Even if those allegations were true, it seems, for the reasons just stated, that our law was not intended to grant them rights to so intervene in the internal economies of foreign vessels.

These allegations of Petitioners were, however, rejected by the District Court, which found that each of the unions was picketing for the sole purpose of forcing the rehiring of the former crew members who had disobeyed the lawful orders of the vessel's master and so been discharged. Picketing for that purpose, their rights as agents of these former crew members should be no different than the rights of their foreign principals; and there is even less reason to find protection for them in the National Labor Management Relations Act.

Petitioners cite two cases which are claimed to support the applicability of the Taft-Hartley Act to a foreign dispute such as this: *Sailors' Union of the Pacific, AFL, and Moore Dry Dock Co.*, 92 NLRB 547, 27 LRRM 1108 (1940) and *Norris Grain Co. v. Seafarers' International Union*, 232 Minn. 91, 46 NW(2d) 94, 26 LRRM 2597 (1950). Neither case is in point. In the *Moore Dry Dock Case*, the case was brought to the Board by an American employer, the owner of the drydock, claiming that picketing by the Sailors' Union was of the drydock and constituted a secondary boycott and unfair labor practice. In the *Norris Grain Case*, the suit for an injunction was similarly brought by the American owner

of a grain elevator, charging the union with a secondary boycott by picketing, not of a foreign vessel, but of the grain elevator. That the Board had jurisdiction of these complaints by American employers seeking injunction of unfair labor practices allegedly committed against them is all that the cases establish. Neither case determined that the act was intended to apply to employment aboard foreign ships.

Quite the contrary, in the *Moore Dry Dock case*, the Trial Examiner referred to the Board's earlier decision in *Companie Maritime Samsoc, Ltd., Sailors Union of the Pacific*, supra, and expressly stated that its decision there had been based on a lack of jurisdiction, 92 NLRB 547, at p. 561, 27 LRRM 1108, at p. 1109. The Board expressly stated that it did not consider whether the foreign shipowner was an "employer" within the meaning of Section 8(b)(4)(a) since that question was not properly before it, 92 NLRB 547 at p. 552, fn. 17. And in the *Norris Grain Case*, the Court emphasized that the question was one of the rights of the American employer, stating

> "* * * It would seem that the impact upon interstate and foreign commerce is the same, whether the object of the picketing is to coerce an employer to recognize a labor union as a bargaining agent for its employees even though N.L.R.B. has no jurisdiction over such employer as it has if the employer is subject to such jurisdiction. The federal act and our state act prohibiting such coercive action both seek to protect an innocent neutral employer who is not involved in the labor dispute. It would be a travesty to hold that such neutral employer has no right to such protection merely because the object of the picketing is to bring pressure

on an employer who is a citizen of a foreign country over whom the N.L.R.B. has no jurisdiction." (46 NW(2d) 94, at p. 103, 232 Minn. 91, at p. 106).

The National Labor Management Relations Act cannot reasonably be held to have intended the protection of foreign employees in their relations with foreign employers. The few cases which have considered the problem so hold.

II. Neither a Strike by Seamen Under Articles nor Picketing to Force the Rehiring of Seamen Who had been Discharged for Striking While Under Articles is Protected "Concerted Activity" Within the Meaning of the National Labor Management Relations Act of 1947

A. Strikes by Seamen Under Articles are not "Concerted Activities" Protected by the National Labor Management Relations Act of 1947

Even had this been an American owned ship, flying the stars and stripes and manned by American seamen, The National Labor Management Relations Act would not have protected "concerted activities" such as the crew of the RIVIERA engaged in by refusing to obey the lawful commands of the master and going on a sit-down strike. Both this Court and the lower Federal Courts have consistently held that the requirements of discipline aboard ship prohibit conduct which might be protected if engaged in by workers ashore. *Southern S.S. Co. v. N.L.R.B.* (1942) 316 U.S. 31, 62 S. Ct. 886, 86 L ed. 1246; *Peninsular & Occidental Steamship Co. v. N.L.R.B.*, (CCA 5, 1938), 98 F(2d) 411; *Rees v. United States*, (CCA 4, 1938), 95 F(2d) 784.

In the *Southern Steamship case*, supra, the crew of an American vessel had gone on strike in a United States port, refused to obey the commands of the vessel's master and remained peacefully aboard the vessel. The strike ended 11 hours later when the shipowner's attorney promised to negotiate with the union to which the seamen belonged. At the end of the voyage the men were discharged. The N.L.R.B. held that an unfair labor practice of the shipowner had precipitated the strike and that the shipowner was, therefore, guilty of a further unfair labor practice in discharging the men. It ordered them reinstated. This Court held the Board's order unenforceable in view of the paramount requirements of maritime discipline. In the opinion of the Court, Mr. Justice Byrnes stated,

> "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land. The lives of passengers and crew as well as the safety of ship and cargo are entrusted to the master's care. Every one and every thing depend upon him. He must command and the crew must obey. Authority cannot be divided. These are actualities which the law has always recognized." (316 U.S. at p. 38, 62 S. Ct. at p. 890, 86 L. ed. at p. 1255).

The *Peninsular and Occidental case* is virtually identical with the one just discussed, except that the crews of two vessels were involved. They engaged in sitdown strikes and threatened further such action in a jurisdictional dispute over representation. As a result the shipowner discharged them and laid up its vessels. The N.L.R.B. ordered reinstatement, deeming the discharges unfair labor practices. The Court of Appeals for the

Fifth Circuit held that no unfair labor practice was involved and reversed the order. It emphasized that the shipowner not only had a right to discharge a mutinous crew, but a duty to do so:

> "A ship that is not manned by a competent crew is unseaworthy. Propellor Niagara v. Cordes, 21 How. 7, 16 L. Ed. 41. No doubt the members of the crews were individually competent as seamen but that was not enough to show the crews were competent as a unit. It would be difficult to imagine any greater grounds of incompetency than disobedience of the lawful orders of the master and the possibility of mutiny. It would be gross negligence for a vessel to put to sea with that kind of crew." (98 F(2d) at pp. 414-415).

Rees v. United States was a criminal prosecution for mutiny of a crew which had engaged in a sitdown strike in a foreign port. They raised the defense that their conduct was protected under the National Labor Relations Act. The Court of Appeals for the Fourth Circuit reviewed the many protections both by legislation and the general maritime law which surround the employment relationship of seamen on the vessel on which they serve. The court pointed out that the safety of lives and property aboard ship depend upon a high discipline which is destroyed by strikes and refusal to obey orders of the master. It stressed the dependence of the seaman upon his vessel and that neither the shipowner nor the seaman is in a good bargaining position in a foreign land, whose shores may be inhospitable to the crew and unproductive of any substitutes for them. For these reasons the court stated:

> "When articles are signed by a crew for a voyage, all bargaining, individual and collective, is ended for the duration of the voyage. A contract is made, binding both owner and seaman, that is lawful, if the articles comply with the statutes, and should be lived up to scrupulously." (95 F.(2d) at p. 792).

Counsel for Petitioners point out that the decisions in both the *Southern Steamship Case* and *Rees v. United States* were based in part on the criminal statutes of the United States against mutiny, which are inapplicable to the Riviera (Pet. Br. p. 37). While technically correct, this is a distinction without substance. Mutiny was a well understood offense long before it became incorporated into the express provisions of our criminal code. And all of the reasoning of the cases cited applies with equal force regardless of the applicability of our mutiny statute.

The needs of discipline at sea are if anything greater on a ship such as the Riviera where there is no common bond of nationality among the members of the crew. The provision of the Riviera's articles that the crew obey the lawful command of the master in everything relating to the ship and the stores and cargo thereof whether on board, in boats or on shore (Tr. 239) is identical with the requirement aboard vessels of the United States (46 U.S.C.A. § 564). A foreign shipowner as well as an American one would be negligent and render his vessel unseaworthy by retention of a mutinous crew. And foreign as well as American seamen are wards of Admiralty, and even to a limited extent of Congress by express provision of The LaFollette Act, 38

Stat. 1164 §§ 4, 11 and 14, 46 U.S.C.A. §§ 597, 599 and 481, so that they have other protections in dealing with their employers than do shore employees.

If the National Labor Management Relations Act of 1947 applies to a foreign crew on a foreign ship at all, it should not be held to protect the mutinous conduct of the Riviera's crew. To do so would not only ignore the bounds of comity among maritime nations, but also place foreign shipowners in the hopeless position of having either to condone mutiny, with consequent liability for unseaworthiness under our maritime law or to discharge the mutinous seamen and thus become liable to the crew under our labor laws.

B. The National Labor Management Relations Act Does Not Protect Picketing for the Purpose of Requiring an Employer to Rehire Employees Discharged for Conduct Which Is Not Protected by That Act, and Which Is Contrary to Other Public Policy.

Counsel for Petitioners, urge that, even if the strike by the Riviera's crew was not protected activity, the picketing of Petitioners is protected as the seamen they represented were then no longer under articles (Pet. Br. p. 36 ff.). In suport of this argument they quoted from this Court's decision in the *Southern Steamship Case*, supra, as follows:

> "* * * nothing that we have said would prevent the union from striking, picketing or resorting to any other means of self-help, so long as the time

and place it chooses do not come within the express prohibition of Congress." (316 U.S. at p. 48, 62 S. Ct. at p. 895, 86 L. ed. at p. 1260).

It is submitted, however, that the quoted dictum of the Court means no more than that picketing by a union would be proper if the crew itself did not participate or refuse orders. Certainly the Court did not intended to say that either the discharged crew, or others representing them, could picket to force their rehire when it ruled that the N.L.R.B. order for their rehire could not be enforced.

The shipowner would be no less negligent and the ship just as unseaworthy with an insubordinate crew forced on it by a picket line as it would with the same crew forced on by an N.L.R.B. order.

What counsel ask the Court to tell seamen is, "You cannot strike while you are under articles; but desert the ship or refuse to obey commands until you are discharged and then your articles will no longer apply and you can strike." To state the request is to reject it.

Even a non-maritime employer cannot be forced to rehire an employee discharged for incompetence, illegal conduct or other just cause, *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 58 S. Ct. 490, 83 L ed. 627, 123 A.L.R. 599. In that case, the Court reversed orders of the Board requiring reinstatement of employees who had engaged in a sitdown strike and also employees discharged for incompetence. Further it held that employees who had aided and abetted the unlawful conduct of the sitdown strikers, although not participating in it,

forfeited the protection of the National Labor Relations Act.

The same should apply here. The picketing was one continuous chain of activity, starting simultaneously with the sitdown strike. Although the participants varied, it was always pursued with the same ultimate objective: renegotiation of the articles of the strikers. To hold part of it protected activity merely because carried out by Petitioners, would be to grant them rights as agents which their principals, the crew, did not have themselves. To hold that an employer may be subjected to economic pressure when he discharges an employee for just cause would in no way clear obstructions from the free flow of commerce. Instead it would hamper a management responsibility necessary to the flow of any commerce at all, and in this case to the safety of lives and property.

III. The National Labor Management Relations Act Provides No Remedy to Respondent and the Common Law Remedy of Damages is not Inconsistent with the Act

Petitioners' entire argument is predicated on the assumption that their picketing must have been protected or prohibited by the Labor Management Relations Act. It is neither. Both because of the foreign nature of the dispute and because it is contrary to paramount public policy, as already argued, the picketing was not protected. Neither does it seem to be prohibited.

Counsel for Petitioners state (Pet. Br. p. 26) that "might be argued" and "could be argued" that the

picketing constituted a secondary boycott prohibited by Section 8(b)(4) of the Act (29 U.S.C.A. § 158(b)(4)) and for which a remedy in damages is provided by Section 303 of the Act (29 U.S.C.A. § 187). But they do not so argue and neither do we. It was not a prohibited secondary boycott but primary picketing. The only case cited by Petitioners that considered the question so holds, *Sailors Union of the Pacific and Moore Dry Dock Co.*, 92 N.L.R.B. 547, 27 L.R.R.M. 1108. As already stated, the owner of the drydock there alleged that picketing of a vessel at the drydock was a secondary boycott directed against it. The Board held the ship a transitory situs of the shipowner and the picketing primary.

Even if it were a secondary boycott, the act would provide no remedy. Section (8)(b)(4) makes it an unfair labor practice "for a labor organization *or its agents*" (emphasis added) to engage in a secondary boycott. But Section 303 speaks only of "any labor organization" and provides an action for damages only against them, not against individuals. It would thus be prohibited conduct so far as the Petitioners are concerned for which no remedy is provided. In such cases a common law remedy for damages may be applied. *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 74 S. Ct. 833, 98 L ed. 1025.

In *Laburnum*, this Court held a common law remedy of damages available against a union agent guilty of coercive conduct that was both tortious and assumed to be an unfair labor practice. As the Court there stated.

"Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act." (347 U.S. at pp. 663-4, 74 S. Ct. at p. 837, 98 L.ed. at p. 1031).

The *Laburnum case* is the only case this Court has decided dealing with the problem. All of the cases cited in Petitioners' lengthy discussion of preemption dealt with the quite different problem of the extent to which state injunctive processes have been eliminated by protection of the Act and the preventive jurisdiction it vests in the Board. In *Laburnum*, the Court pointed out the difference:

"To the extent that Congress prescribed preventive procedure against unfair labor practices, * * * the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilties for tortious conduct have been eliminated. The care we took in the Garner Case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. The primarily private nature of claims for damages under state law also distinguishes them in

a measure from the public nature of the regulation of future labor relations under federal law." (347 U.S. at p. 665, 74 S. Ct. at p. 838, 98 L ed. at pp. 1031-2).

Finally even as regards labor organizations against which the Act provides a remedy, the forum is not exclusive; but includes the forum here employed, a federal district court (Section 303(b)) in a district where the organization sued has "duly authorized officers or agents * * * engaged in representing or acting for employee members" (Section 301(c)). No administrative determination by the Board is necessary before bringing an action for damages, *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 72 S. Ct. 235, 96 L ed. 275.

CONCLUSION

Respondent respectfully prays that the court affirm the judgments of the Court of Appeals for the Ninth Circuit in so far as they affirm the judgments of the District Court for the District of Oregon.

Respectfully submitted,

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